APPENDIX

Present: All the Justices.

COUNTY BOARD OF ARLINGTON COUNTY

v.

MARY ROSE GREEN GOD

Record No. 740803

PER CURIAM

Richmond, Virginia, September 5, 1975

From the Circuit Court of Arlington County

PAUL D. BROWN, *Judge*

This is a zoning case in which the County Board of Arlington County denied the application of the landowner, Mary Rose Greene God, for rezoning from single-family residential district (R-6) to apartment house district (RA6-15) of two adjoining lots in the northern portion of the County. Upon the landowner's motion for declaratory judgment, the trial court found that the existing zoning was unreasonable, and therefore invalid, and that the denial of the rezoning was arbitrary and capricious. In its final order, the court placed the land in the zoning classification sought by the landowner.

While the appeal awarded in this case brings under review the trial court's holding that the rezoning denial was arbitrary and capricious, the principal reason we awarded the appeal was to examine the court's action in actually rezoning the land. In light of our recent decisions in the *Randall, Allman*, and *Williams* cases,[1] all handed

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[1] *City of Richmond* v. *Randall*, 215 Va. 506, 211 S.E.2d 56 (1975), *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), and *Board of Supervisors of Fairfax County* v. *Williams*, — Va. —, S.E.2d — (1975).

down after the date of final judgment in the present case, we are constrained to affirm, in summary fashion, the trial court's finding of arbitrariness and capriciousness and to reverse, in similar fashion, the court's action in rezoning the land.

First, with respect to the holding that the rezoning denial was arbitrary and capricious, the evidence fully sustains the trial court's conclusion. The two lots in question, together with two other lots in different ownership, are the remnants of a larger single-family residential district established in 1950 in a block now almost entirely zoned for and devoted to apartment uses, in an area of Arlington County dominated by garden-type apartment houses. The landowner showed that the construction of single-family residences on the lots in question would be economically unfeasible; that the existing zoning was unreasonable; and that her proposed use, the construction of 10 "townhouses of garden apartment style" under an appropriate zoning classification, would be reasonable. Against this, only the opposition of a local civic association and the claim of a serious water problem, which proved to be non-existent, suggested that the present zoning should be retained.

The landowner's evidence was sufficient to overcome the presumed legislative validity of the Board's action and to show that the denial was unreasonable. The Board, however, in its turn, failed to produce evidence sufficient to show that the denial was reasonable. The question, then, was not fairly debatable. *See City of Richmond* v. *Randall, supra,* 215 Va. at 511, 211 S.E.2d at 60. Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. *See Board of Supervisors of Fairfax County* v. *Allman, supra,* 215 Va. at 445, 211 S.E.2d at 55.

With respect to the trial court's action in actually rezoning the lots in question, the landowner, in light of *Allman,*

concedes that the court "did not have the right . . . to simply rezone the land." The landowner also concedes that under the evidence before the trial court there are, in addition to the RA6-15 apartment classification she sought, other multiple-unit zoning categories which would permit her proposed use. The landowner agrees, therefore, that the case must be remanded for further consideration by the Board, at the direction of the trial court, of an appropriate multiple-unit zoning classification for her property.

Accordingly, we affirm the trial court's findings that the existing single-family zoning of the lots in question is invalid and that the Board's denial of rezoning was arbitrary and capricious. We reverse the action of the court in actually rezoning the land. The case will be remanded to the trial court with instructions to enter another order. The new order will suspend the adjudication of invalidity for a prescribed period of time and direct the Board to consider further legislative action. Because the evidence shows that the apartment-house use proposed by the landowner is reasonable,[2] the new order will enjoin the Board during the prescribed period from taking any action which would disallow such use. The new order will further provide that should the Board fail to take appropriate action within the prescribed period, the adjudication of invalidity will become operative and the injunction will become permanent, provided that the landowner shall not put her property to any uses other than those shown by the record to be reasonable.

Affirmed in part, reversed in part, and remanded.

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[2] In light of the landowner's concession that other multiple-unit zoning categories would permit her proposed use, the Board, following remand, will be free to consider such other categories in addition to the RA6-15 zoning sought by the landowner.

Present: Carrico, Harrison, Cochran, Harman, Poff and Compton, J.J.

PER CURIAM

Record No. 740584

CITY COUNCIL OF THE CITY OF FAIRFAX, VIRGINIA

v.

JOHN F. SWART, JR., ASA A. SWART and THE HECHINGER COMPANY

Richmond, Virginia, September 5, 1975

From the Circuit Court of Fairfax County

PERCY THORNTON, JR., *Judge*

The City Council (Council) of the City of Fairfax (City) denied the application of the landowners, John F. Swart, Jr., and Asa A. Swart, and their lessee, The Hechinger Company, (collectively referred to as Swart) to rezone 3.285 acres of land on Jermantown Road in the City of Fairfax from single-family residential use (R-3) to commercial use (C-2). Upon Swart's motion for declaratory judgment, the trial court found the Council's action in refusing to rezone the subject property to be unreasonable, arbitrary and capricious, and, therefore, null and void. The court, in its final order, permitted Swart to develop the land "in accordance with the . . . ordinances of the [City] relating to development in the C-2 zoning classification . . ."

As in *County Board of Arlington County* v. *God*, 216 Va. — S.E.2d — (Record No. 740803, this day decided), our principal reason for awarding this appeal was to examine the court's action in actually rezoning the land. While the City claims error in the court's finding of arbitrariness and capriciousness and in refusing to admit the evidence of one witness proffered by the City, we affirm those rulings.

With respect to the holding that the denial of rezoning

was arbitrary and capricious, the evidence fully sustains the trial court's conclusion. For a number of years John F. Swart, Jr., and Asa F. Swart have owned a 5.652 acre tract in the northwest quadrant of the intersection of Jermantown Road and Lee-Jackson Highway (Route 50) in the City. The southern 2.367 acres of the tract, which fronts on both Route 50 and Jermantown Road, is zoned commercial, as is all of the frontage on Route 50 in the City from its intersection with Routes 29-211 at Kamp Washington, approximately one-half mile southeast of the Swart tract.

The Western boundary line of the Swart tract is also the boundary line between the City and the County of Fairfax The land abutting the Swart tract on the west is comprehensively planned by Fairfax County for high density residential use, a classification permitting up to 20 dwelling units per acre. The land across Jermantown Road, to the east of the Swart tract, is zoned commercial. The evidence showed that a bank and a convenience store were already in operation there and that a six story motel was under construction. All of the road frontage on Jermantown Road for more than one-half mile south of the Swart tract was zoned either commercial or industrial.

While the property adjoining the Swart property on the north, fronting 200 feet on the west side of Jermantown Road, is still zoned residential (R-3), the adjoining tract to the north was rezoned commercial (C-2) by the Council in 1969. To the north of and adjoining this C-2 tract is a high density, multi-family housing development.

North of the Swart tract, the City owns a parcel of land fronting approximately 1500 feet on the east side of Jermantown Road, adjoining the motel site. An intermediate school, with access to both Bevan Drive, a residential street, and Jermantown Road, occupies the northern portion of this parcel.

When a comprehensive land plan for the area was last adopted by the City in 1968, this plan designated all of the frontage on Jermantown Road south of the existing multi-family housing development as an area for commercial development.

Swart's expert evidence established that the construction of single-family residences on the tract in issue was economically unfeasible; that the existing zoning was unreasonable; and that the proposed commercial use, a large hardware department store, is a reasonable use of the property and compatible with the area.

While the City presented evidence that the tract in question "could" or "might" be developed under its existing R-3 zoning, this evidence was so insubstantial, vague and speculative as to be unconvincing to the trial court, as it is to use.

Here the landowner's evidence was sufficient to overcome the presumed legislative validity of the Council's action and to show that the denial was unreasonable. Thereafter, the City failed to produce evidence sufficient to show that the denial was reasonable. The question, then, is not fairly debatable. *See City of Richmond* v. *Randall*, 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975). Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. *See Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 445, 211 S.E.2d 48, 55 (1975).

We find no error in the trial court's refusal to qualify Edward Trexel, a member of the City Planning Commission, as an expert witness. The qualification of an expert witness is a matter largely within the discretion of the trial court and its ruling will not be disturbed in the absence of the showing of an abuse of such discretion. *See Ames & Webb, Inc.* v. *Commercial Laundry*, 204 Va. 616, 621, 133 S.E.2d 547, 550 (1963).

The final question presented concerns the trial court's rezoning of the land. This case was decided by the Chancellor before our recent decisions in *City of Richmond* v. *Randall, supra, Board of Supervisors of Fairfax County* v. *Allman, supra,* and *Board of Supervisors of Fairfax County* v. *Williams,* 216 Va. —, S.E.2d — (1975). Since the rezoning violates the legal principles set forth in those cases, we summarily reverse that part of the final order of the trial court.

Accordingly, we affirm the trial court's finding that the existing R-3 zoning of the land in question is invalid and that the Council's denial of rezoning was arbitrary and capricious. We, likewise, affirm the trial court's ruling in refusing to qualify Trexel as an expert. We reverse the action of the court, however, in actually rezoning the land and the case will be remanded with instructions to enter another decree. The new decree will suspend the adjudication of invalidity for a prescribed period of time and remand the matter to the Council for further legislative action. Since the City has made no showing of an alternate reasonable use, the new decree will enjoin Council, during the prescribed period, from taking any action which would disallow the one use shown by the record to be reasonable. The decree of the trial court will further provide that should the Council fail to comply within the time prescribed, the adjudication of invalidity of zoning classification R-3 for the property will become operative and the injunction will become permanent, provided that Swart shall not put the property to any use other than the use shown by the record to be reasonable.

Affirmed in part; reversed in part; and remanded.